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PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI

IN THE SUPREME COURT OF THE UNITED STATES

No. 735

(1) Jake Klein, (2) Julian Garrett, and Loyat Bland Garrett, Husband and Wife,

Plaintiffs

vs.

The United States,

Defendant.

Julian Garrett, and Loyat Bland Garrett, Husband and Wife, Neill Garrett and Pearl Garrett, Husband and Wife, and Earl Wagner, Third-Party,

Plaintiffs

vs.

The United States,

Defendant.

Bert A. Bandstra
116 1/2 East Main
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Attorney for Plaintiffs

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Bert A. Bandstra,
for Plaintiffs

Howard O. Sigmond
Edwin L. Weisl, Jr., Asst. Attorney
General Solicitor General, for
defendant.

PLAINTIFFS' PETITION FOR WRIT
OF CERTIORARI

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1. The plaintiffs' petition for the review by writ of certiorari of (1) the judgment and opinion of the Court of Claims in the above entitled consolidated cases and reported in F 2d ; (2) the ruling of the said court denying the plaintiffs' Motion for Leave to Amend; and (3) the ruling of the said court denying the plaintiffs' Motion to Review and Vacate the said judgment.

2. The said opinion was filed April 14, 1967, and is appended hereto; the order denying plaintiffs' motion for leave to amend was filed April 14, 1967; and the order denying the plaintiffs' motion to review and vacate the said judgment was filed July 20, 1967.

3. A general, unrestricted jurisdiction to entertain such petitions for Writ of Certiorari is conferred by:

> 28 U.S.C. 1255. Court of Claims; Certiorari; certified questions.
> Cases in the Court of Claims may be reveiwed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted on petition of the United States or the claimant;
> *******

4. The principal questions to be submitted are:

(a) Did the plaintiffs, in their petitions as amended, adequately allege a taking and a cause of action under the Fifth Amendment of the Constitution of the United States and the Tucker Act against the defendant for the taking of gravel, gravel rights and gravel contracts, and gravel business, belonging to the plaintiffs?

(b) Did the defendant conclusively disprove the allegations of the plaintiffs' petitions so as to entitle it to summary judgment (1) by stating in written briefs and arguments affirmative defenses of frustration, confession and avoidance, and res judicata based on void and interlocutory rulings from the United States District Court for the Southern District of Iowa; and (2) by presenting to the lower court improperly and ex parte one of the said void and interlocutory rulings?

(c) Did the lower court err in refusing the plaintiffs leave to file a second amendment to the petitions so they could controvert the said void and interlocutory rulings, when such matters were new matters and sub-

sequent in time to the plaintiffs' petitions, and upon which the Court of Claims based in part its granting of the defendant's motion for summary judgment?

(d) Should not the plaintiffs' motions for summary judgment have been granted when the record shows that the defendant admitted liability for the taking of the gravel contracts?

5. The laws involved in the case are:

Constitution of the United States, Fifth Amendment: *** nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just conpensation.

28 U.S.C. 1491. Claims against United States generally; ***

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

*******.

28 U.S.C. 1358. Eminent domain.

The district courts shall have original jurisdiction of all proceedings to condemn real estate for the use of the United States or its departments or agencies.

28 U.S.C. 1403. Eminent domain.

Proceedings to condemn real estate for the use of the United States or its departments or agencies shall be brought in the district court of the district where the land is located, or, if located in different districts in the same State, in any of such districts.

28 U.S.C. 1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

40 U.S.C. 257. Condemnation of reality for sites and other uses; jurisdiction.

* * * * *

40 U.S.C. 258a. Same; lands, easements, or rights-of-way for public

use; taking of possession and title in advance of final judgment; authority; procedure.

* * * * *

Said declaration of taking shall contain or have annexed thereto-

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate

> or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; * * * * *

STATEMENT OF THE CASE

These two cases, consolidated below, arose from the claims of the parties to two gravel contracts, for just compensation for the subsequent taking without condemnation by the defendant of the gravel contracts and gravel rights, the gravel itself, and the parties' gravel business. The two gravel contracts covered two farms owned by the plaintiffs, Garrett, who were the grantors in the contracts. The grantees were the plaintiff Wagner in the contract on one of the farms (case 66-66 below), and the plaintiff Klein in the contract on the other farm. (Case 60-66 below)

Subsequent to the execution and recording of the contracts the defendant by declarations of taking in February and December of 1962, took the fees simple of the two farms for the Red Rock Dam Project and deposited "estimated just compensation" in the registry of the United States District Court for the Southern District of Iowa, in which court the declarations of taking

were filed. There was no mention of gravel, gravel rights, gravel contracts or gravel business. A large part of the monies deposited were paid to the Garretts as owners of the land, but the defendant refused to pay any compensation to the plaintiffs Wagner and Klein, and refused to bring any proceedings as to the said gravel contracts, etc., and refused to deposit any money as estimated just compensation for said gravel contracts, etc.

The defendant forbade the performance of the contracts and brought legal proceedings to prevent the performance of the contracts and threats of imprisonment were made as to anyone trying to perform the contracts. The defendant then provided thousands of tons of gravel from the plaintiffs' land covered by the gravel contracts, to customers of the plaintiff gravelmen and such customers hauled away thousands of tons of gravel, all without compensation to the plaintiffs, and after denying that the plaintiffs had any right to compensation for the gravel contracts, etc.

The gravel contracts were for terms of five years and provided that the gravel was to be removed as soon as practicable. A royalty of 10¢ per cubic yard was to be paid to the landowners, the plaintiffs Garrett, as the gravel was taken out. The Garretts remained in possession of all the gravel land, under leases from the defendant, for more than the five year term of the contracts. During this time the de-

fendant did nothing with this land except to collect rent from the Garretts. The land has not been flooded and the Dam will not be operational until after, perhaps several years after, June 1, 1969. Nothing about the construction of the dam would have interferred in any way with the performance of the gravel contracts, and the performance of the gravel contracts would not have interferred with in any way the construction of the dam.

On February 21, 1966, and February 23, 1966, the plaintiffs filed the present actions in the Court of Claims. The Court of Claims has jurisdiction over these cases under the Fifth Amendment of the Constitution of the United States, and under the Tucker Act, 28 U.S.C. 1491. The defendant then brought the condemnation cases to trial in the district court, one trial beginning April 4, 1966, and the other beginning May 16, 1966. The defendant, completely reversing its position, moved that the District Court give instructions to the condemnation commission authorizing the commission to determine what amount, if any, of the award made for the land to the Garretts should be awarded to the gravel-contractors, Wagner and Klein, for the gravel contracts. The District Court had previously instructed the commission that the gravel could be valued only as land and as part of the land and that it could not be valued as "merchandise". There was no reference to making any award for the gravel contracts to the Garretts who, of course,

also were parties to the gravel contracts as grantors, for the loss of the royalty rights provided for by the said contracts. The defendant's motions were sustained and the instructions given over the objection of the Garretts. The commission awarded $5000.00 to Wagner and $1000.00 to Klein out of the awards made to the Garretts for the land. No payment or award of any kind was ever allowed to the Garretts for the gravel contracts.

In its opinion of April 14, 1967, (appended hereto) the Court of Claims refers to the trials of the condemnation cases before the condemnation commission in the District Court and particularly to certain memoranda (which were not final judgments) of the district court dated October 19, 1966, and December 13, 1966, in which the District Court confirmed the commission's awards of $5000.00 to Wagner and $1000.00 to Klein. Copies of the memoranda had never been furnished or sent to the plaintiffs and the plaintiffs submit that the Court of Claims received one of such memoranda ex parte.

The final judgments in the district court condemnation cases being subsequent to the plaintiffs' petition and their first amendment to their petition, the plaintiffs moved for leave to file a second amendment in the Court of Claims. In their second amendment to their petitions the plaintiffs met and controverted the district court memoranda which was new matter

in the Court of Claims in the cases at bar and part of which new matter the Court of Claims had already received ex parte. But, on the same day, April 14, 1967, that the Court of Claims filed its opinion, which is hereto appended, granting the defendant's motions for summary judgment and denying the plaintiffs' cross-motions for summary judgment, the Court of Claims denied the plaintiffs' Motion for Leave to Amend. The plaintiffs then filed their Motion to Review and Vacate Judgment which Motion the Court of Claims denied on July 20, 1967. The plaintiffs then made their application to the clerk of the Court of Claims under the rules of that court for a certification of the record to the Supreme Court for the purpose of filing a petition for a writ of certiorari and the plaintiffs received a letter dated September 28, 1967, from the Clerk stating that the record was being transmitted to the Supreme Court.

ARGUMENT

The granting of the defendant's Motions for summary judgment and the denial of the plaintiffs' Cross-Motions rests upon two affirmative defenses which were neither pleaded nor proved. In the words of the Court of Claims' opinion of April 14, 1967, which is hereto appended, they are (1) "to the extent the gravel contracts gave an interest in land, that interest has been paid for in the condemnation suits" and (2) "but that, to the extent these contracts were personal property, they were not taken by United States

at all but simply frustrated as in the cases cited." The plaintiffs submit that the gravel contracts cannot be divided in any such fashion.

The plaintiffs agree that the gravel contracts were not taken by the defendant in the condemnation cases. The contracts were, however, taken by the defendant, without condemnation. The plaintiffs had no remedy in the condemnation cases and were therefore compelled to seek their remedy under the Tucker Act. It is conceded by all parties that only land was included and taken in the condemnation cases. It is also conceded, and found by the Court of Claims in its opinion of April 14, 1967, that "No mention was made of the gravel contracts or of the gravel rights in any of the documents filed in any of the proceedings, ***" in the condemnation cases. Yet the Government's authority and power to take property depends entirely upon its compliance with the declaration of taking law, 40 U.S.C. 258a under which it must state the property being taken together with its estimate of just compensation therefor and file its declaration of taking in court and deposit in court the amount of money it had estimated as just compensation. The land was listed in declarations of taking and monies deposited as estimated just compensation, and a large part of said monies was paid to the landowners for their land. But nothing was paid and the defendant refused to pay anything whatsoever for the gravel contracts or to the gravel-men, and such conduct in the defendant clearly established that it did not intend to

and did not take the gravel rights and contracts by condemnation.

Presumably the Court of Claims employed the term "interest in land" in its opinion of April 14, 1967, as stated above, as being synonymous with land. But an "interest in land" may well be, as it is in the instant cases, personal property. Indeed, the Court of Claims itself holds that easements and mineral leases are not land. Thus, in Kennecott Copper v. U. S., 347 F. 2d 275, 294 (1965) the Court of Claims held that:

> The surface rights acquired by plaintiff were easements in, over and under land. An easement is a right of one in the land of another. It is not the land itself.

And in Handelman v. U. S., 357 F. 2d 694, 698 (1966) the Court of Claims said:

> One more crucial step in setting the background of the present issue was decided in the Burt case (Burt v. U. S., 145 Ct. Cl. 282, 170 F. Supp. 953, 1959) and again is not challenged. The court held that the leasehold interest held by the lessee was not a purchase of the property and that the owner of the land remained the owner of the minerals upon which the tax was levied. The court cited as authority for that position State v. Evans, 99 Minn. 220, 106 N.W.

958 (1906), in which the Supreme Court of Minnesota stated, at page 227:

> "The propriety of a lease for the purpose of developing and working mines is recognized by all of the cases, and the rule established by the great weight of authority that such leases do not constitute a sale of any part of the land. ***"

It is interesting to note that the Court of Claims followed and freely adopted the law of the State of Minnesota in the case just cited, but, as indicated near the close of its opinion of April 14, in the instant cases, it does not seem disposed to follow the law of the State of Iowa.

In any event the record does not support the holding of the Court of Claims that the gravel contracts, as an interest in land, were paid for in the condemnation cases. The position of the Court of Claims is, necessarily, that the decisions of the District Court are res judicata on such issue. In the first place it is not even claimed that the plaintiffs, Garrett, who were also parties to the gravel contracts, were awarded anything for the loss of their royalty rights provided for in the contracts. Furthermore, res judicata is an affirmative defense that must be pleaded and proved. And this is a requirement of the Court of Claims' own rules, Rule 19 (b) as well as being the general rule.

Also, only final judgments are admissible in support of pleas of res judicata, and there is no final judgment of the District Court in the record. The District Court rulings of October 19, 1966, and December 13, 1966, as referred to by the Court of Claims in its opinion of April 14, 1967, are not final judgments and are not properly in the record. Actually these rulings are void as to the gravel matters, the district court and the Government having no jurisdiction over the gravel contracts, the gravel contracts not having been included in the condemnation cases.

The counsel for the plaintiffs states professionally that appeals have been taken from the rulings and judgments of the District Court in both condemnation cases to the Court of Appeals of the Eighth Circuit and that one of the propositions to be submitted to the appellate court is that the District Court had no jurisdiction over the gravel contracts in the condemnation cases and that the awards made for the gravel contracts were without jurisdiction and void.

The holding of the Court of Claims in its opinion of April 14, 1967, that the gravel contracts, as personal property, were not taken by the United States but were frustrated, is not supported by the record. In their Petition filed February 23, 1966, the plaintiffs alleged:

> 8. That the defendant has forbidden the performance of the said gravel

contract, Exhibit A, and has required and forced the said Earl Wagner to remove his gravel equipment from the said land; and the said Earl Wagner then discontinued his gravel operations on said land and made no further effort to perform his contract.

9. That thereafter, on June 11, 1963, an original notice identical to the original notice that had been served upon the plaintiffs Garrett on February 26, 1962, was served on the said Earl Wagner; and that said notice did not include or make any reference whatsoever to gravel and gravel rights or to gravel contracts or to the said gravel contract Exhibit A.

10. That in December, 1964, the defendant removed and hauled away quantities of gravel from the said land.

11. That the defendant has taken from the plaintiffs the gravel rights provided for by the said gravel contract, Exhibit A, and gravel covered by said contract, without the institution of any condemnation proceedings whatsoever as to said rights and property; that the said defendant has refused to bring any condemnation pro-

ceedings against said gravel rights and gravel, and the said defendant refuses to pay or deposit and has not paid or deposited any money whatsoever as just compensation, estimated just compensation or damages for having taken from and deprived the plaintiffs of the use and benefits of their said gravel contract and the gravel covered by said contract.

In their first amendment to their Petition the plaintiffs alleged:

2. That the said gravel bearing land is not within any construction area, and that the said land has not been physically entered upon by the defendants; that the actual physical possession of the said land has remained in the said plaintiffs' Garrett from the spring of 1942 to the present time, and that the said plaintiffs Garrett have the said land rented from the defendant until March 1, 1967, and that they are entitled to continue in the possession of said land until said time, to wit, March 1, 1967; that there has been some assurance by the defendant that the said plaintiffs may continue to rent the said land after March 1, 1967;

3. That the building of the Red Rock Dam has not, as yet, physically affected said land in any way, and that it is anticipated that the said land will not be flooded until the said Red Rock Dam is in actual operation, and that the defendant has stated that it is expected that the Dam will be operational about June 1, 1969;

4. * * *

5. That the said gravel contracts, plaintiffs' Exhibits A, are both for terms of five years beginning in 1962 and terminating in 1967, and both contracts provide for renewal periods of five years, and that the performance of said contracts for the full terms of five years, and for a part of the said renewal periods of five years, would not have interfered with or prejudiced in any way, the construction of the Red Rock Dam;

6. That the construction of the Red Rock Dam has not interfered with or affected, in any way, the performance of the said gravel contracts; that the said Red Rock Dam, itself, would not interfere in any way, or prevent the performance

of the said gravel contracts until it is in actual operation, which will be some time after June 1, 1969;

7. That the plaintiffs Jake Klein and Earl Wagner were prevented from performing the said contracts by the direct action of the defendant, which action was taken with the intention of stopping and preventing the performance of the said contracts; that said action included, also, the bringing of certain legal proceedings to make sure that said contracts were never performed, and the making of threats to jail anyone attempting to perform said contracts;

8. That thereafter the said defendant furnished thousands of tons of gravel from the land covered by the said gravel contracts, Exhibits A, to former gravel customers and prospective gravel customers of the plaintiffs Jake Klein and Earl Wagner;

9. That the aforesaid conduct of the defendant was a taking in the constitutional sense, of the plaintiffs' said gravel contracts, Exhibits A, and the use and benefits of said contracts, and the rights and in-

> terests created and resulting from the said contracts, and that the said conduct of the said defendant was, also, a taking in the constitutional sense, of the gravel business of the plaintiff Jake Klein and the plaintiff Earl Wagner; and that said taking was probably intended by the defendant to relate back to the time of the taking of the fee simple of the said gravel bearing tracts;

Leave to file the plaintiff's First Amendment was first denied, then allowed.

The defendant, on August 17, 1966, filed its "Defendant's Brief in Support of Commissioner's Report on Defendant's Motions and Plaintiffs' Cross-Motions for Summary Judgment in which reference was made to paragraph 8 of the Plaintiffs' First Amendment at the bottom of page 3 and the top of page 4 as follows:

> "The plaintiffs allege that the defendant prevented them from developing their sand and gravel contracts by making them stop excavating gravel. They make a distinction between the acquisition of the fee simple title by condemnation and interference with possession by actions of the officers of defendant or the eventual flooding. The plaintiffs allege further that the defendant furnished

thousands of tons of gravel to gravel customers of the plaintiffs. 1/"

"1/ This allegation is denied. Defendant admits that in November, 1962, it instructed the plaintiffs to cease the gravel mining operations as shown by Plts. Ex. C. to the Cross-Motion for Summary Judgment in Case No. 66-66 but defendant alleges that it did not sell any gravel from this pit. Defendant has been informed that the project manager permitted the county in the area to take such gravel as it needed to use on the local county roads without payment to defendant. Since the defendant had acquired title in February of 1962, it was perfectly proper to deal with this property as defendant's and to tell plaintiffs not to mine gravel. The action of the project manager in permitting the county to haul gravel away concerns a matter about which plaintiffs have no interest."

Apparently the lower court felt that this "denial" and the "allegations" made by defendant not by answer, but by mere statements, some of which were hearsay, in argument, conclusively refuted or disproved the allegations of the plaintiffs' Petition as amended, so as to

entitle defendant to summary judgment. The allegations in the Petition should govern. But the defendant, although outside the rules of pleading, has attempted to join issue with the plaintiffs. Under these circumstances, the plaintiffs submit, the defendant has waived its motion for summary judgment and its conduct estops it from further assertion of its said motion. Unquestionably the plaintiffs have alleged a taking of the gravel contracts by deprivation, and by direct, affirmative and intended action by the defendant, as well as a taking of their gravel business by the defendant. The record shows a disregard of the adversary principle and a denial of the due process of the law to the plaintiffs. If the defendant wishes to plead general denials or affirmative defenses let it do so by answer, as by law provided, and then let there be a trial on the merits, as favored by the law.

Although the plaintiffs have argued strenuously throughout the record in the Court of Claims that the gravel contracts were personal property and therefore not included in condemnation proceedings that could have jurisdiction only over land, the acts of the defendant in the condemnation cases in the District Court may make this question immaterial. The defendant, and the defendant alone, as the agent of the Congress, selects the properties to be included in its declarations of taking and the defendant, and the defendant alone, estimates the "estimated just compensation" that it is required by 40 U.S.

258a to deposit when its declarations of taking are filed. Although the gravel contracts were personal property, the defendant still could fail to include them and deposit "estimated just compensation" for them even if they were real property. The gravel contracts were not listed in the declarations of taking and they were not included by implication in the declarations of taking because the defendant did not intend that they be so included. If the gravel contracts were taken in the condemnation cases the law requires the defendant to pay out immediately the "estimated just compensation" deposited for them. But the defendant refused to pay out anything to the gravelmen. The defendant's intentions must be determined by its acts.

But after the plaintiffs brought their actions in the Court of Claims under the Tucker Act the defendant moved that the condemnation commission be authorized to make awards, to be taken from the awards made for the land, to the gravelmen and this was done. But, as pointed out by the plaintiffs in their proposed second amendment, which the Court of Claims refused to let them file, the awards to the gravelmen were to be paid when deposited. The money still remaining in the District Court as originally deposited with the Declarations of Taking back in 1962 were not to be used to pay these awards. New deposits were to be made.

The plaintiffs submit that property cannot be added to property taken by declarations of

taking in any such fashion. A new declaration of taking or at least an amendment of the old one would be required listing the new property and "estimated just compensation" would have to be deposited to cover the new property. This was not done and the plaintiffs had already conferred jurisdiction on the Court of Claims by filing their Petitions in February, 1966.

The acts of the defendant limited its condemnation actions to the land only, not including the gravel contracts or business, and the plaintiffs were forced to bring a separate action under the Tucker Act. The plaintiffs might refer at this point to the Iowa law, which requires separate actions for determining the compensation to be paid for the land and the gravel rights, the Iowa Supreme Court holding that these rights are several and separate and not joint. Also, under the Iowa law the gravel rights must be compensated for, and there is no doctrine of frustration in Iowa.

In Iowa the leading case on the general subject is Comstock v. Iowa State Highway Commission, 254 Iowa 1301, 121 N.W. 2d 205 (1963) in which the Iowa State Highway Commission after settling for the fee of the land brought condemnation against a gravel lease. There is no Iowa court of claims and under Iowa law the State can be compelled to bring condemnation proceedings. Recovery was had in the lower court and the Supreme Court of Iowa, affirming, said:

> A leasehold interest is property and when taken in the exercise of eminent domain is compensable. Korf v. Fleming, supra; Batcheller v. Iowa State Hy. Comm., 251 Iowa 364, 368, 369, 101 N.W. 2d 30; Wicks v. Iowa State Hy. Comm., ____ Iowa ____; 119 N.W. 2d 781, 787. The issue in the case at bar was the compensation due the owner of the leasehold and not the value of the land. The interests of the lessor and lessee were several and not joint. An award to one would in no manner affect or prejudice the other's rights. Batcheller v. Iowa State Hy. Comm., supra.

And, under Erie Rr. Co. v. Tompkins, 304 U.S. 64, 78, and under 28 U.S.C. 1652 set out in full in the first part of this petition the Iowa law should be the Rule of Decision in the cases at bar.

The plaintiffs refer again to the lower court's denial of their motion for leave to file second amendment, after the defendant had been permitted to introduce new matters into the case. The cases that uphold the plaintiffs' position are so numerous that the plaintiffs will cite but one of them.

The case is this Court's Foman v. Davis, Executrix, 371 U.S. 178, 182 (1962). This Court, referring to the mandate that leave to amend "shall be freely given when justice so requires" stated, "this mandate is to be heeded."

This Court also stated:

> Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

The Court of Claims gave no reason for its denial of the plaintiffs' Motion for Leave to Amend. And Rule 22 (a) (1) of the Court of Claims and Rule 15 (a) of Rules of Civil procedure of the United States District Court both require, in identical mandatory language, that leave to amend "shall be freely given when justice so requires. It is not justice, and a denial of the adversary prinicple, to refuse to allow one side to meet new matters introduced into the case by the other side.

Wherefore the plaintiffs petition that a Writ of Certiorari issue for the reveiw of the judgment and opinion of the Court of Claims of April 14, 1967, in which the defendant's motions for summary judgment were allowed and the plaintiffs' cross-motions were denied, for the reveiw of the said court's ruling of April 14, 1967, denying the plaintiffs' Motion for Leave to Amend, and for the review of said court's ruling of July 20, 1967, denying the

plaintiffs' Motion to Review and Vacate said judgment.

Respectfully submitted

Bert A. Bandstra
116 1/2 East Main Street
Knoxville, Iowa

CERTIFICATE OF SERVICE

The undersigned certifies that he is a member of the bar of this Court and that he served the above and foregoing Petition for a Writ of Certiorari by mailing a true copy thereof by prepaid air mail to each of the following persons:

The Solicitor General of the United States
Mr. Edwin L. Weisl, Jr., Assistant Attorney General
Mr. Howard O. Sigmond

Bert A. Bandstra

APPENDIX

In the United States Court of Claims

(Decided April 14, 1967)

No. 60–66

(1)* JAKE KLEIN, (2) JULIAN GARRETT, AND LOYAT BLAND GARRETT, HUSBAND AND WIFE v. THE UNITED STATES

No. 66–66

JULIAN GARRETT, AND LOYAT BLAND GARRETT, HUSBAND AND WIFE, NEILL GARRETT AND PEARL GARRETT, HUSBAND AND WIFE, AND EARL WAGNER, THIRD-PARTY PLAINTIFF v. THE UNITED STATES

Bert A. Bandstra, for plaintiffs. *Hugh W. Lundy*, attorney of record for plaintiff Jake Klein. *Julian Garrett*, attorney of record for plaintiffs Julian Garrett and Loyat Bland Garrett, Neill Garrett and Pearl Garrett.

Howard O. Sigmond, with whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

ON DEFENDANT'S MOTIONS AND PLAINTIFFS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

PER CURIAM:* These cases arise out of proceedings instituted by the United States in the United States District

*This opinion incorporates with minor changes the opinion prepared by Commissioner Richard Arens at the direction of the court, under Rule 54(b), with additions required by subsequent events.

Court for the Southern District of Iowa to condemn land in Marion County, Iowa, for flood control purposes. The cases are before the court on cross-motions for summary judgment and have been ordered consolidated under Rule 47(a).

The Garretts, who were owners of two parcels of land in Marion County, Iowa, entered into two 5-year gravel contracts, one in January 1962 with Earl Wagner[1] and the other in October 1962 with Jake Klein, pursuant to which Wagner was granted the right to stockpile and remove gravel from one parcel, and Klein was granted the right to stockpile and remove gravel from the other parcel, upon payment to the Garretts of 10 cents per cubic yard.

After the execution of each of the gravel contracts, the Government in 1962 instituted a condemnation proceeding with the result that the fee simple titles to several tracts of land, including the two above-mentioned parcels owned by the Garretts, were taken, subject to then existing easements, and moneys were deposited with the district court as estimated just compensation. No mention was made of the gravel contracts or of the gravel rights in any of the documents filed in any of the proceedings, but all plaintiffs in the instant cases were served with notice of the proceedings. Thereafter, upon application of the Garretts, the district court issued orders under which there was disbursed to the Garretts approximately $130,000 which was part of the moneys deposited as estimated just compensation, without prejudice to their right to have the sum of just compensation adjudicated.

In February 1966, the petitions in the instant cases were filed in this court, in which plaintiffs seek amounts which they claim as just compensation under the Fifth Amendment for the "taking" by defendant of the use and benefits of the gravel contracts. The parties agree that the fee simple titles taken by defendant included the gravel deposits which are real property and part of the land; but plaintiffs contend that the gravel contracts are personal property and are not included in the condemnation cases; and hence that plaintiffs are entitled to make claim in this court for losses sustained because of the "taking" of the contracts. De-

[1] Pursuant to a motion of the Garretts, Earl Wagner was made a plaintiff in case No. 66–66.

fendant's position is in substance that plaintiffs' only remedy is in the district court in which the condemnation cases are pending, and that frustration of the gravel contracts is a consequential damage which is not compensable.

In April 1966, a condemnation commission, appointed by order of the district court, conducted a trial on the issue of just compensation for the taking of the parcel from which Earl Wagner had the contract rights to stockpile and remove gravel. At the trial the testimony of Julian Garrett, Earl Wagner and other witnesses, adduced by both parties, was received. The commission found and reported to the court that the just compensation for the taking of the title in fee was $121,800 of which $5,000 was to be apportioned to Earl Wagner for the loss of his gravel contracts, and $116,800 was to be apportioned to the Garretts as the former property owners. In valuing the parcel, the commission allowed $16,000 as an additional increment for the underlying sand and gravel. The district court confirmed the commission's award on October 19, 1966, in an opinion which specifically dealt in some detail with the enhancement in value flowing from the sand and gravel, and with the value of the sand and gravel lease. That court has also confirmed (on December 13, 1966) the commission's award on the parcel from which Jake Klein had the right to stockpile and remove gravel. The award for that tract was $117,345 plus an enhancement for sand and gravel of $6,000, a total of $123,345; $1,000 was assigned to Klein's lease.

It is not, of course, the province of this court to review these reports of the commissions or to review the rulings of the district court in the condemnation cases; but it is sufficient for the purpose of ruling on the motions for summary judgment which are before this court to announce the conclusion which the decided cases compel, namely, that on the basis of the pleadings, the motions and the exhibits which accompany the motions, plaintiffs do not have a cause of action in this court.

As stated above, both parties agree that the fee simple titles taken by defendant included the gravel deposits which are real property and part of the land. Hence, the compensation for such deposits as part of the land is for the determination of the district court. *A. W. Duckett & Co.*

v. *United States*, 266 U.S. 149 (1924); *Travis* v. *United States*, 152 Ct. Cl. 739, 287 F. 2d 916 (1961), *cert. denied*, 368 U.S. 824; *Brooks* v. *Shepard*, 157 F. Supp. 379 (S.D. Ala., 1957); *United States* v. *158.76 Acres of Land*, 298 F. 2d 559 (2d Cir. 1962); *United States* v. *Sunset Cemetery Co.* 132 F. 2d 163 (7th Cir. 1943).

We come then to the legal implications of the alleged "taking" of the gravel contracts as distinct from the gravel deposits. A leading case which lays down the guidelines that must be followed in the instant case is *Omnia Commerical Co.* v. *United States*, 261 U.S. 502 (1923), in which the Government requisitioned the entire production of a steel company and directed that company not to comply with an outstanding contract for the sale of steel plate to a customer. The customer brought an action in this court to recover losses which it sustained as the result of its inability to perform the contract. The Supreme Court, in affirming the judgment of this court denying recovery, stated at pp. 510–11:

> * * * If, under any power, a contract or other property is *taken* for public use, the Government is liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable. What was here requisitioned was the future product of the Steel Company, and, since this product in the absence of governmental interference would have been delivered in fulfillment of the contract, the contention seems to be that the contract was so far identified with it that the taking of the former, *ipso facto*, took the latter. This, however, is to confound the contract with its subject-matter. The essence of every executory contract is the obligation which the law imposes upon the parties to perform it. "It [the contract] may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other." *Dartmouth College* v. *Woodward*, 4 Wheat. 629, 656. Plainly, here there was no acquisition of the obligation or the right to enforce it. If the Steel Company had failed to comply with the requisition, what would have been the remedy? Not enforcement of the contract but enforcement of the statute. If the Government had failed to pay for what it got what would have

been the right of the Steel Company? Not to the price fixed by the contract but to the just compensation guaranteed by the Constitution.

In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended.

Parties and a subject-matter are necessary to the existence of a contract, but neither constitutes any part of it—the contract consists in the agreement and obligation to perform. If one makes a contract for the personal services of another or for the sale and delivery of property, the Government, by drafting one of the parties into the army, or by requisitioning the subject-matter, does not thereby take the contract.

Two years later the Supreme Court was again confronted with a claim similar to that which was made in the *Omnia Commercial* case. In *Mitchell* v. *United States*, 267 U.S. 341 (1925), the Government acquired by eminent domain land which was used in the business of growing and canning corn of a special grade and quality. The court held that while the special value of the land due to its adaptability for use in a particular business is an element which the owner of the land is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as a just compensation upon a taking by eminent domain, there could be no recovery for consequential damages for loss to plaintiff's business or for its destruction. The court further held that if the business was destroyed, the destruction was an unintended incident of the taking of the land and that absent a statute allowing recovery therefor, there could be no allowance of an amount as just compensation under the Fifth Amendment.

Mitchell, *supra*, was recently cited and followed by this court in *R. J. Widen Co.* v. *United States*, 174 Ct. Cl. 1020, 357 F. 2d 988 (1966), in which the plaintiff therein claimed just compensation under the Fifth Amendment for injuries to its personal property and business as the result of loss of water because of a flood control project. The court con-

cluded that while the Government's acts constituted a taking of the plaintiff's real estate and water rights, there was no taking in the constitutional sense of the plaintiff's personal property and business and that the damages thereto, all of which were occasioned by the termination of the plaintiff's water supply, were incidental to or the consequences of the Government's taking of the real estate and water rights, and as such are not compensable. The court stated at pp. 1028 and 1029:

> * * * Undoubtedly, the United States could here have "taken" plaintiff's personal property and business, in which case just compensation would be due. But this was not done. The only taking in the present case was of the plaintiff's real estate and water rights, for which compensation has been fully paid * * *: The additional losses claimed in this proceeding are in the nature of consequential damages, that is to say, they were "an unintended incident" of the actual taking. * * *
>
> It is settled law that in the absence of specific statutory mandate, compensation under the Fifth Amendment may be recovered only for property taken and not for incidental or consequential losses, the rationale being that the sovereign need only pay for what it actually takes rather than for all that the owner has lost. [citing cases] Hence the incidental spoilation of the plaintiff's inventory and equipment, the reduction or loss of its good will and profits, and the expenses incurred in having to re-adjust its manufacturing operations are non-compensable under long-established legal principles.

We conclude that, to the extent the gravel contracts gave an interest in the land, that interest has been paid for in the condemnation suits but that, to the extent these contracts were personal property, they were not taken by the United States at all but simply frustrated as in the cases cited. In connection with the plaintiff's argument that the contracts were personal property under Iowa law, it is worth noting that federal law determines what constitutes real property for the purposes of federal eminent domain. *State of Nebraska* v. *United States*, 164 F. 2d 866, 867–68 (8th Cir. 1947), *cert. denied*, 334 U.S. 815 (1948). In any event, plaintiffs have no cause of action in this court. See *Dicker*,

et al. v. *United States*, Ct. Cl. No. 250–66, decided by order of the court entered March 10, 1967.

Defendant's motions for summary judgment are granted, plaintiffs' cross-motions for summary judgment are denied, and plaintiffs' petitions are dismissed.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 1 1967
JOHN F. DAVIS, CLERK

ADDITIONAL APPENDIX TO PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI

IN THE SUPREME COURT OF THE UNITED STATES

No. 735 October Term, 1967

(1) Jake Klein, (2) Julian Garrett and Loyat Bland Garrett, Husband and Wife,

Plaintiffs

vs.

The United States,

Defendant.

Julian Garrett and Loyat Bland Garrett, Husband and Wife, Neill Garrett and Pearl Garrett, Husband and Wife, and Earl Wagner,

Plaintiffs

vs.

The United States,

Defendant.

Bert A. Bandstra,
116 1/2 East Main
Knoxville, Iowa 50138,
Attorney for Plaintiffs.

ADDITIONAL APPENDIX TO PLAINTIFFS'
PETITION FOR WRIT OF CERTIORARI

IN THE SUPREME COURT OF THE
UNITED STATES

No. 735 October Term, 1947

(1) Jake Klein, (2) Julian Garrett and
Loyal Bland Garrett, Husband and Wife,

Plaintiffs

vs.

The United States,

Defendant

Julian Garrett and Loyal Bland Garrett,
Husband and Wife, Neill Garrett and
Pearl Garrett, Husband and Wife, and
Earl Wagner,

Plaintiffs

vs.

The United States,

Defendant

Bert A. Bandstra
116 1/2 East Main
Knoxville, Iowa 50138
Attorney for Plaintiffs

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ADDITIONAL APPENDIX

Pertinent parts of opinions in related cases (2) in the United States District Court for the Southern District of Iowa

U.S. v. 1795.01 Acres etc, and B. Frank Tonda, et al, No. 5-1233, Tract 866 (Involved Garrett-Wagner gravel lease)

MEMORANDUM, filed October 19, 1966

This matter is now before the Court upon objections to the report of the Commission determining just compensation for the taking of the title in fee of tract 866 consisting of 541 acres of land and for the taking of a gravel lease on said premises.

* * * * *

The declaration of taking of the land in question was filed herein on February 14, 1962. Tract 866 was one of thirteen tracts (13) involving the taking of fee simple title. Flowage easements were taken over an additional fifteen (15) tracts. Total estimated compensation deposited with the Court at the time of taking was $302,935. Estimated compensation for the tract in question totalled $62,000. The owners are Julian Garrett and Loyat Bland Garrett, husband and wife, and Neill Garrett and Pearl Garrett, husband and wife, herewith referred to as the Garretts. On June 4, 1963, Earl Wagner was joined as a defendant on account of a sand and gravel lease he entered into with the Garretts on January 8,

1962, approximately one month before the declaration of taking was filed herein.

* * * * * During the course of the hearings before the Commission, the government filed a request for special findings as follow:

> " * * * hereby requests the Commission to set forth in its Findings of Fact and Conclusions of Law whether or not there was any enhancement to Tract No. 866 by virtue of the fact that sand and gravel deposits are located under a portion of said tract. If the answer to the above is in the affirmative, the Commission should set forth the extent of the enhancement, if any.
>
> "That plaintiff makes this request in accordance with the intent of the Supreme Court in U. S. v. Merz, 376 U.S. 192, 198-199 (1964). "

* * * * *

In its report the Commission, after setting out a summary of the evidence offered in behalf of each party, made findings of fact and indicated therein the reasoning they used in arriving at their conclusion as to value. * * * *

* * * * *

g. The Commission finds as a fact that an additional increment should be allowed by reason of the fact that sand and gravel unerlying tract 866 and that such an additional increment should be added in the amount of $16,000.00.

h. The market for gravel is set out on Exhibit Wagner S, showing that Wagner has averaged selling 53,815 tons of gravel from 1958 to 1965 inclusive. At this rate during the life of the Wagner-Garrett contract he would have exhausted about ten acres of the 40 acres in the gravel pit area.

i. The Commission finds that the added increment of $16,000.00 for the gravel under tract 866 is in addition to the $275.00 per acre allowed as farm and cropland and is stated in response to the request of the attorneys for the government."

In conclusion the Commission found that "the highest and best use of tract 866 is for agricultural purposes with a secondary use for the mining of gravel." It found that just compensation for the entire fee simple title to tract #688 to be $121,800.00; that the value of the gravel lease was $5,000.00. The report further shows that the Commission in finding the total

just compensation allocated the same as follows:

350 acres of cropland at $275.00 per acre	$ 96,250.00
191 acres of timber, waste and building sites, including buildings	9,550.00
Additional increment allowed for the underlying sand and gravel under tract 866	16,000.00
Total	$121,800.00

The government's initial complaint is that the Commission erred in allowing separate values for the land and for the alleged existence of sand and gravel underlying the surface, thus violating the so-called unit rule of valuation. United States v. Certain Parcels of Land, 149 F. 2d 81, 82 (5th Cir. 1945); United States v. Cunningham, 246 F. 2d 330, 333 (4th Cir. 1957). It would not be proper for the Commission to arrive at value by adding all the elements of value together. However, it would be proper for the Commission to consider the different values of various parts of the tract, the different uses for which some parts of it were available and it should set out in its report the amount of land available for crop purposes, pasture land, timber land, waste land and the range of values

considered for the various types of land found to exist. The Commission was specifically instructed that the market value of the land as land remains the test. In the second paragraph of Instruction No. 4, the Court instructed as follows:

> "The court further instructs the commissioners that when a tract of land contains minerals, timber, buildings or any other features which constitute a part of the realty, the existence of these features can be taken into consideration, in determining the compensation so far as they affect the market value of the land but the market value of the land as land remains the test and there can be no recovery for any of the foregoing elements valued separately as merchandise as items additional to the value of the land."

The Commission was specifically requested by the government to set out the enhancement, if any, to the tract on account of the deposit of sand and gravel. The government's complaint that the Commission erred in setting out the enhancement value is therefore without merit. Actually the government's chief complaint is that the evidence failed to establish any enhancement value on account of gravel and the Commission failed to indicate how it arrived at the figure of $16,000 for that purpose. A review of the

summary of evidence indicates that there is support for the Commission's findings. Earl Wagner, lessee, under the gravel lease entered upon the land in 1962 and cleared the overburden from 1.7 acres of the 40 acre tract known as the gravel pit, and stockpiled several thousand tons of gravel. He also testified with respect to the market for gravel that existed in that area. He had sold an average of 53,815 tons of gravel from all sources for the years 1958 to 1965. In summary, the government argues that the widespread presence of gravel in the Des Moines River Valley, plus the limited demand in the area just does not warrant a finding that the value of the land for sand and gravel production enhanced the overall value of tract 866 in the sum of $16,000.

It should also now be noted that defendant Earl Wagner strenuously objects to the Commission's findings regarding value for sand and gravel as being too low. He contends that on the basis of borings or tests conducted by himself on 38 acres of the land in question, the same had a value for gravel purposes of $1,500 per acre or a total of $57,000. He further contends that the Commission failed to consider the owner's (Julian Garrett) testimony that the gravel bearing lands in the tract extended to two hundred (200) acres or a total value of $200,000. Defendants, Garretts, likewise contend the enhancement value of $16,000 is grossly inadequate. They particularly argue that the Commission failed to consider Julian Garrett's testimony that two hundred acres of land were underlaid with gravel. It

should also be noted that all defendants object to the Commission striking the testimony of L. J. Peters concerning the sale of a gravel pit near Runnells, Iowa, by Earl Wagner to L. J. Peters for $2,800 for two (2) acres. The sale took place subsequent to the date of taking of the tract in question and evidence regarding the same was properly disregarded by the Commission.

It is the view of the Court that the evidence, including the summary of evidence, plus the exhibits, amply supports the findings of the Commission as to the enhancement of value due to the presence of sand and gravel. The amount thereof is a matter of judgment and the Commission need not set out any formula for arriving at its opinion. In fact, if a formula were used that method would probably be in error. The Court is satisfied that the Commission weighed the various factors which influenced the market value of the land for sand and gravel purposes. The mere presence of sand and gravel is not enough. "There must be some objective support for the future demand, including volume and duration." Mills v. United States, 363 F. 2d 78 (8th Cir. 1966). The record supports the Commission's finding that there was sand and gravel in quantity underlying the tract in question of a marketable quality and that there was a market therefor in limited quantities. In so doing it is clear that the Commission properly rejected defendants' contentions that the mere presence of gravel in large quantities warranted

a finding of a high value which was purely speculative in view of the limited market then available or reasonably foreseeable in the future. United States v. 599.86 Acres of Land, 240 F. Supp. 563, 572 (W. D. Ark. 1965). On the other hand, there was substantial evidence indicating there was a limited market for gravel which taken together with the presence of gravel on the tract in question formed a basis for the Commission's judgment that the presence of sand and gravel enhanced the market value of the tract.

The next dispute involves the question of the value of the sand and gravel lease known as the Wagner-Garrett Lease, which was entered into on January 8, 1962. The government fails to see how any value can be assigned to the lease in view of the Commission's finding of fact: "2. a. There is no direct testimony of the fair and reasonable value of the lease." The government ignores the further findings of the Commission with respect to the gravel lease which are as follows:

> "2. b. There is, however, evidence of the existence of sand and gravel in quantity underlying tract 866 and of a marketable quality.
>
> c. There is evidence of the market, in the area of tract 866, for mine run gravel in limited quantities.

d. There is evidence that the operation of a gravel pit on tract 866 would be profitable.

e. Based upon the market, the quantity and quality of the sand and gravel and the reasonable profit which could be anticipated the Commission finds that the just compensation to Earl Wagner for the taking of the lease of January 8, 1962, is $5,000.00."

Defendant Wagner contends the award of $5,000 is clearly erroneous for all of the reasons set out in urging that the finding of $16,000 for enhancement value was inadequate. Defendants Garretts are not concerned with the value assigned to the lease but do argue that under no circumstances should the award of $5,000 be deducted from the total award of $121,800.00 for tract 866 and that any award for the gravel lease should be in addition to that awarded for the tract, citing, Comstock v. Iowa State Highway Commission, 254 Iowa 1301, 121 N.W. 2d 205; Batcheller v. Iowa State Highway Commission, 251 Iowa 364, 368-69, 101 N.W. 2d 30. The government and Wagner apparently agree that federal law applies and whatever value is assigned to the lease should be deducted from the total award. Eagle Lake Improvement Co. v. U. S., 160 F. 2d 182 (5th Cir. 1949). However, the government contends that the matter of distribution is a question for the Court and not the Commission.

Initially it should be noted that all defendants requested the Court to instruct " * * * after you have determined just compensation for the fee simple estate taken by the government, you are instructed to determine what amount, if any, of such just compensation shall be awarded Earl Wagner by reason of such gravel contract." The Garretts having requested the Court to so instruct, they will not now be heard on their present complaint that the lease value should have been added to the total award. With respect to the government's objection that this was a matter solely for the Court, suffice to say that it was within the province of the Court to assign this task to the Commission. Rule 71A(h) and Rule 53(c) Fed. R. Civ. P. See, Moore's Federal Practice, 2d Ed., Vol. 5, § 53.06. It was proper for the Court to instruct the Commission to first determine the value of the total interest taken by the government and then ascertain the proportion of each party's interest therein. Gawzner v. Lebenbaum, 180 F. 2d 610, 613 (9th Cir. 1950); Eagle Improvement Co. v. U. S., supra; United States v. 31.07 Acres of Land, 189 F. Supp. 845, 848 (D. Montana 1960). In this case there was no evidence offered of the market value of the lease or the market value of real estate subject to a gravel lease. The Commission thus considered the various factors enumerated in its report in determining the actual value of the lease. It must be recognized that seldom, if ever, will there be evidence from which the market value of a lease may be determined. It is the view of the Court that the Commission's de-

termination of the value of the lease and the basis therefor is supported by the evidence and the same is approved.

* * * * *

Dated this 19 day of October, 1966.

/s/ Roy L. Stephenson
CHIEF JUDGE

CONFIRMATION OF REPORT OF CONDEMNATION COMMISSION AND JUDGMENT ON JUST COMPENSATION AND ORDER OF DISTRIBUTION, filed November 15, 1966

NOW on this 15th day of November, 1966, this matter comes before the Court for confirmation of the Report of Condemnation Commission herein filed on April 20, 1966, and for entry of judgment on just compensation, as to Tract No. 866, in this cause, and the Court having reviewed the file in this cause, finds:

1. That the Court has jurisdiction of the parties and subject matter of this action; that the tract herein referred is Tract No. 866 in this cause, which said tract is described in Declaration of Taking herein filed, said description being further set forth in Appendix "A" hereto.

2. That service of process has been

perfected on all parties defendant as to said tract, being those persons now ascertained who had an interest in said tract on date of taking, to-wit: February 14, 1962.

3. That on the 14th day of February, 1962, the estates taken in the above designated tract vested in the United States of America, upon the filing of the Declaration of Taking and the depositing therewith in the Registry of this Court the sum of $62,000.00, which sum was estimated by the acquiring agency to be the just compensation for the estates taken in said tract.

* * * * *

7. That the issue of just compensation for said taking was referred to a Condemnation Commission by Order of this Court dated August 2, 1963, and that in accordance with the instructions of this Court thereafter entered and upon trial of said issue, said Commission reported its findings to this Court on April 20, 1966.

8. That the award of the Condemnation Commission, as reported to this Court by said Report of Condemnation Commission, should be confirmed, accepted and adopted as the findings of fact of this Court as to said tract, said Report finding the fair and reasonable market value of the estates taken in Tract No. 866 on date of taking herein to be $121,800.00; that interest should be further awarded on the difference between the amount deposited in the Registry of this Court and said award, from February 14,

1962, to the date of deposit of said amount, excluding the period from February 23, 1966 to April 4, 1966, the difference being $65,700.00.

9. That the other and remaining finds of said Commission as so reported should be confirmed, accepted, and adopted as findings of fact of this Court.

10. That the persons who should receive the award herein adjudicated, for said Tract are Julian Garrett, Loyat Bland Garrett, Neill Garrett, Pearl Garrett and Earl Wagner, and that, upon the deposit of the above said difference, with interest, in the Registry of this Court, distribution thereof should be made.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That on February 14, 1962, plaintiff, United States of America, filed herein its Complaint in Condemnation, which included the real property designated in these proceedings as Tract No. 866, the legal description of said lands being more fully set forth in said Complaint in Condemnation.

2. That on the same day plaintiff filed in this action a Declaration of Taking, which included the aforesaid property, and deposited in the Registry of this Court the sum of $62,000.00 as the estimated just compensation therefor; that thereupon, the estate and interest in and to

said property, described and fully set forth in said Declaration of Taking as condemned herein by the United States of America, became vested in the plaintiff, United States of America; that possession of said tract is confirmed in plaintiff as of the first day of March, 1962.

3. That on the fourteenth day of February, 1962, title to the extent of the estates acquired, as described in plaintiff's Complaint and Declaration of Taking, in the above-designated tract, vested in the plaintiff, United States of America, free and discharged from all liens and claims whatsoever; and the right to just compensation for the property taken vested on the same date in the persons entitled thereto.

4. That the total sum of $121,800.00 is hereby awarded as just compensation in full for the taking of said estates in the hereinbefore described land, all in accordance with the findings, conclusions and recommendations of the Commission filed herein.

5. That the findings of the Condemnation Commission as to the above captioned tract, as reported to this Court by said Commission, are hereby confirmed, accepted, and adopted as the findings of this Court; and the award of just compensation for the taking of said tract as so reported, is hereby adopted and adjudged as just compensation for said taking; said amount being $121,800.00 with interest as hereinafter described; and said amount, $121,800.00,

is herebys decreed against plaintiff, United States of America and in favor of the person entitled thereto, said amount including and representing deficiency judgment against plaintiff, United States of America, in the amount of $65,700.00, with interest accruing on the deficiency amount from February 14, 1962, to date of deposit of said deficiency amount in the Registry of this Court at the rate of six per centum per annum. However, it has been agreed that on any increase above the deposit allowed the Garretts and on any money awarded Wagner, that interest would be waived for the period from February 23, 1966 until April 4, 1966.

6. That all defendants, known or unknown, named and designated in the Complaint herein, other than those to whom compensation is specifically awarded herein are hereby forever barred and excluded from asserting any title, interest or estate in, lien upon or claim against the estates taken in said tract.

IT IS FURTHER ORDERED that, upon deposit of the amount of said deficiency judgment by plaintiff, United States of America, in the Registry of this Court, disbursement of said compensation shall be made as follows:

TO: JULIAN GARRETT, LOYAT BLAND GARRETT, NEILL GARRETT AND PEARL GARRETT, the sum of $62,500.00, plus interest

at 6% on the sum of $60,
700.00 from February 14,
1962, to date of deposit of
deficiency amount, excluding
the period from February 23,
1966 to April 4, 1966, a per-
iod upon which the interest of
the deficiency was waived by
the defendants Garrett; * * * *

TO: EARL WAGNER, the sum of
$5,000.00, plus interest at 6%
on the sum of $5,000.00 from
February 14, 1962 to date of
deposit of this amount, exclud-
ing the period from February
23, 1966, to April 4, 1966, a
period upon which interest was
waived by defendant Wagner;

the balance of said compensation having been heretofore disbursed pursuant to prior Order of this Court.

DATED THIS 15th DAY OF NOVEMBER, 1966.

/s/ Roy L. Stephenson
CHIEF JUDGE

U.S. v. 1087.42 Acres etc, and Gerrit Van Mever, et al, No. 5-1330, Tracts 303, 306;
U.S. v. 520.24 Acres etc, and Ralph C. Kuiper,

et al, No. 5-1411, Tract 359; (Involved Garrett-Klein gravel lease)

MEMORANDUM filed December 13, 1966

This matter is now before the Court upon the objections of the plaintiff and the defendants to the report of the Commission fixing the value of tracts 303, 306 and 359. * * * * * The defendants Jake Klein, Loyatt Bland Garrett and Julian Garrett filed a twenty-one page pleading on November 23, 1966, entitled "motion to strike and plea to the jurisdiction." It was signed by the foregoing defendants but not by counsel of record appearing for said defendants. Plaintiff has moved to strike defendants' motion for the reason the same was not timely filed. Defendants made no application for an extension of time in which to file objections to the Commission's amended report. The "motion to strike and plea to the jurisdiction" was not timely filed and will therefore be stricken and not considered by the Court. Rules 71A(h), 53(e)(II). It is noted, however, that the contentions of defendants' motion were raised in substance in the original objections to the Commission's report filed by counsel for defendants Loyat Bland Garrett and Julian Garrett. The matters were also raised in oral arguments to the Court by attorneys for all of the defendants.

* * * *

The government contends the Commission's award for land value of $117,345.00 is excessive. The Commission also found that the enhancement

to tract 306 by reason of sand and gravel was $6,000 for a total value of $123,345. Reference throughout is to tract 306 (812 acres). Tract 303 (1 acre) award $310; and tract 359 (3.96 acres) $560., are not in dispute. The Garretts contend that the "Commissioners erred on the conservative side in their determination of just compensation, and that the Court should increase said amounts to a more realistic and actual just compensation."

* * * *

The Garretts next object to the finding of the Commission that:

> 5. The enhancement to tract 306 by reason of the sand and gravel which underlies a portion of this tract is hereby found to be $6,000 as of December 11, 1962.

The Garretts contend that evidence shows that the tract did contain marketable gravel and that it was in demand. The evidence before the Commission indicated that there was a very limited market for sand and gravel in this area. The mere presence of sand and gravel is not enough. "There must be some objective support for the future demand, including volume and duration." Mills v. United States, 363 F. 2d 78 (8th Cir. 1966). Under the circumstances the judgment of the Commission that the presence of sand and gravel increased the potential value of the farm in the sum of $6,000 is supported by the record.

In oral arguments the defendant Klein and the defendants Garretts contend that the award of $1,000 for the sand and gravel lease entered into between the Garretts and Klein on October 12, 1962, should under no circumstance have been deducted from the total award, and that any award for the gravel lease should have been in addition to that awarded for the tract, citing, Comstock v. Iowa State Highway Commission, 254 Iowa 1301, 121 N.W. 2d 205 (1963); Batcheller v. Iowa State Hgwy. Comm., 251 Iowa 364, 368-69, 101 N.W. 2d 30 (1960).

At the outset it should be noted that all of the defendants requested that the Court give the Commission the following specific instruction:

> In this case the ownership of the land is in the Garretts who entered into a gravel contract with Jake Klein. After you have determined just compensation for the fee simple estate taken by the Government, you are instructed to determine what amount, if any, of such just compensation shall be awarded Jake Klein by reason of such gravel contract.

It was proper for the Court to assign to the Commission the task of determining the value of the gravel lease and to deduct the sums from the total interest taken by the government. Rule 71A (h), 53 (c) Fed. R. Civ. F. See also, Moore's Federal Practice, 2 Ed., Vol. 5, § 53.06. The Commission first determined the entire in-

terest taken by the government, including the gravel lease and then determined the proportion of each party's interest thereon. Gawzner v. Lebenbaum, 180 F. 2d 610, 613 (9th Cir. 1950); Eagle Lake Improvement Co. v. United States, 160 F. 2d 182 (5th Cir. 1947); United States v. 31.07 Acres of Land, 189 F. Supp. 845, 848 (D. Montana 1960). The Commission noted that the letter from the Corps of Engineers to the Garretts announcing that condemnation proceedings were contemplated and that possession of the property would be taken March 1, 1963, was written September 27, 1962, which was prior to the date the lease was entered into. The Commission in its report indicated its belief "that the value of the Garrett-Klein gravel contract of October 12, 1962, estimated by Klein at $348,480 had nominal value only and no real value because of lack of markets for the sand and gravel and because of the quality of gravel and the expense of mining it, with a heavy overburden on top of it." The finding of the Commission that the lease had a value of $1,000 and that the same should be subtracted from the overall award of $124,215 is supported by the record. * * * * .

In summation, the Court finds that the report of the Commission, as amended, meets the requirements set by United States v. Merz, supra, and is in conformance with the Court's instructions. The findings as to value are amply supported by record now before the Court.

Dated this 13th day of December, 1966.

/s/ Roy L. Stephenson
CHIEF JUDGE

CONFIRMATION OF REPORTS OF CONDEMNATION COMMISSION AND JUDGMENT ON JUST COMPENSATION AND ORDER OF DISTRIBUTION, filed December 23, 1966

NOW, on this 22nd day of December, 1966, this matter comes before the Court for confirmation of the Report of Condemnation Commission herein filed on June 9, 1966, and the Amendment to Report of Commission filed October 18, 1966, and for entry of judgment on just compensation as to Tracts Nos. 303 and 306, Civil No. 5-1330, and Tract No. 359, Civil No. 5-1411, and the Court having reviewed the file in this cause finds:

1. That the Court has jurisdiction of the parties and subject matter to this action; that Tracts Nos. 303, 306 and 359 are more fully described in plaintiff's Declaration of Taking herein filed.

2. That service of process has been perfected on all parties defendant, being those persons now ascertained who had an interest in Tracts Nos. 303 and 306 on date of taking, December 11, 1962; and Tract No. 359 on July 16, 1963.

3. That on December 11, 1962, the estates taken in Tracts Nos. 303 and 306 vested in the United States of America, upon the filing of the Declaration of Taking and the depositing in the Registry of this Court estimated just compensation in the sum of $300.00 for Tract No. 303 and $85,100.00 for Tract No. 306; that on July 16, 1963, the estate taken in Tract No. 359 vested in the United States of America, upon the filing of the Declaration of Taking and the depositing in the Registry of this Court estimated just compensation in the sum of $10,000.00; that Orders for Delivery of Possession were entered herein granting plaintiff possession of said tracts as follows:

Tracts Nos. 303 and 306, Civil No. 5-1330. March 1, 1963;

Tract No. 359, Civil No. 5-1411, March 1, 1964;

* * * * *

8. * * * * * said report finding just compensation for the Garrett-Klein contract for sand and gravel dated October 12, 1962, in Tract No. 306, on date of taking to be $1,000.00, and that interest should be further awarded from December 11, 1962, to date of deposit of said award.

* * * * *

10. That the persons who should receive the award herein adjudicated, for said tracts are Julian Garrett, Loyat Bland Garrett,

and Jake Klein, and that, upon the deposit of the above said difference, with interest, in the Registry of this Court, distribution thereof should be made.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above and foregoing findings are hereby made a part of the judgment and order of the Court, and

1. That December 11, 1962, plaintiff, United States of America, filed herein its Complaint in Condemnation, which included Tracts Nos. 303 and 306; that July 16, 1963, plaintiff, United States of America, filed herein its Complaint in Condemnation which included Tract No. 359, the legal description of said lands being more fully set forth in said Complaints in Condemnation.

2. That on December 11, 1962, plaintiff filed in this action a Declaration of Taking, which included Tracts Nos. 303 and 306, and deposited in the Registry of this Court estimated just compensation in the sum of $300.00 for Tract No. 303 and $85,100.00 for Tract No. 306; that on July 16, 1963, plaintiff filed in this action a Declaration of Taking, which included the aforesaid property and deposited in the Registry of this Court estimated just compensation in the sum of $10,000.00 for Tract No. 359; that thereupon the estates and interest in and to said property, described and fully set forth in said Declarations of Taking as condemned

herein by the United States of America, became vested in the plaintiff, United States of America; that possession of said tracts is confirmed in plaintiff as follows:

Tracts Nos. 303 and 306, March 1, 1963;

Tract No. 359, March 1, 1964;

3. That on the 11th day of December, 1962, and July 16, 1963, title to the extent of the estates acquired, as described in plaintiff's Complaints and Declarations of Taking, in the above-designated tracts, vested in the plaintiff, United States of America, free and discharged from all liens and claims whatsoever; and the right to just compensation for the property taken vested on the same dates in the persons entitled thereto.

4. That the total sum of $124,215.00 is hereby awarded as just compensation in full for the taking of said estates in the hereinabove described land, all in accordance with the findings, conclusions and recommendations of the Commission filed herein.

5. That the findings of the Condemnation Commission as to the above captioned tracts, as reported to this Court by said Commission, are hereby confirmed, accepted and adopted as the findings of this Court; and the award of just compensation for the taking of said tracts as so

reported is hereby adopted and adjudged as just compensation for said taking, said amount being $124,215.00 with interest as hereinafter described; and said amount, $124,215.00, is hereby decreed against plaintiff, United States of America, and in favor of the persons entitled hereto, said amount including and representing deficiency judgment against plaintiff, United States of America, in the amount of $38,255.00, with interest accruing on the deficiency amount of $38,255.00 from December 11, 1962, to date of deposit of said deficiency amount in the Registry of this Court at the rate of six percent per annum.

6. That all defendants, known or unknown, named and designated in the Complaint herein, other than those to whom compensation is specifically awarded herein, are hereby forever barred and excluded from asserting any title, interest or estate in, lien upon, or claim against the estates taken in said tracts.

IT IS FURTHER ORDERED that upon deposit of the amount of said deficiency judgment by plaintiff, United States of America, in the Registry of this Court, distribution of said compensation shall be made as follows:

TO JULIAN GARRETT and
LOYAT BLAND GARRETT,
for Tract No. 306, the sum of
$45,755.00, plus interest at

6 percent on the sum of $37,245.00, from December 11, 1962, to date of deposit of deficiency amount; for Tract No. 303, the sum of $310.00, plus interest on the sum of $10.00 from December 11, 1962, to date of deposit of deficiency amount; for Tract No. 359, the sum of $560.00, to be paid from the original deposit of $10,000.00 for Tract No. 359;

TO JAKE KLEIN, the sum of $1,000.00, plus interest at 6 percent on the sum of $1,000.00 from December 11, 1962, to date of deposit of this amount;

* * * *

the balance of said compensation having been heretofore disbursed pursuant to prior order of this Court.

Dated this 22nd day of December, 1966.

/s/ Roy L. Stephenson
CHIEF JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that he is a member of the bar of this Court and that he served the above and foregoing Additional Appendix to Petition for Writ of Certiorari by mailing a true copy thereof by prepaid air mail to each of the following persons:

Hon. Erwin Griswold, Solicitor General
of the United States
Hon. Edwin L. Weisl, Jr., Asst. Attorney
General
Hon. Howard O. Sigmond

Bert A. Bandstra

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 735

JAKE KLEIN, JULIAN GARRETT, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

JULIAN GARRETT, ET UX., NEILL GARRETT, ET UX., AND EARL WAGNER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims in these consolidated actions (Pet. App. 1–7) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on April 14, 1967. A motion to review and to vacate the judgment was denied on July 20, 1967 (Pet. 2). The petition for a writ of certiorari was filed on Oc-

282-072—67

tober 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether, when the United States condemns land in fee and pays just compensation based on the fair market value of the land as enhanced by a gravel deposit, it must pay additional compensation for a contract the owners had made with third parties providing for removal of the gravel upon payment of royalty.

STATEMENT

The Garretts were owners of two parcels of land in Marion County, Iowa. In 1962, the Garretts entered into two five-year gravel contracts under which Klein (as to one parcel) and Wagner (as to the other) were allowed to remove and stockpile gravel. Subsequent to the execution of the two contracts, the United States instituted a proceeding in the United States District Court for the Southern District of Iowa for the condemnation of land including the two parcels. Both Klein and Wagner were joined as parties in that proceeding.

On October 19, 1966, the district court confirmed an award of a condemnation commission, which found the just compensation for one of the tracts to be $121,800. Of this amount, $116,800 was apportioned to the Garretts as owners of the fee, and $5,000 was apportioned to Wagner for his gravel rights. In determining the total value of this tract, the commission specifically found a $16,000 increment attributable to sand and gravel. On December 13, 1966, the district

court confirmed a commission award of $123,345 as the value of the other tract. Of this amount, $122,345 was apportioned to the Garretts and $1,000 assigned to Klein's gravel interest. Again, the commission arrived at the overall value by finding that the tract was enhanced $6,000 due to sand and gravel.[1]

In February 1966 petitioners commenced these suits in the Court of Claims to recover compensation from the United States for the alleged taking of the two gravel contracts or the benefits enjoyed under those contracts (Pet. App. 2). The Court of Claims granted the United States' motion for summary judgment and denied petitioners' cross-motion for summary judgment. The court held that, to the extent the gravel contracts gave the third parties an interest in the land, such interest had been paid for in the district court action and that, to the extent the contracts constituted personal property, they were not taken but merely frustrated (Pet. App. 6).

ARGUMENT

As the petition makes clear (Pet. 12), petitioners seek compensation for the taking of "gravel contracts," as distinct from "gravel deposits." However, as the Court of Claims recognized, the contracts "were not taken by the United States at all but simply frustrated" (Pet. App. 6). The law is clear that the Fifth Amendment does not require compensation for con-

[1] *United States* v. *1,795.01 Acres, etc.*, Civil No. 5–1233, and *United States* v. *1,087.42 Acres, etc.*, Civil No. 5–1330, (S.D. Iowa). The Garretts have appealed from these condemnation proceedings.

sequential damages resulting, as here, from the frustration of contracts or business when land is condemned. *Omnia Commercial Co.* v. *United States,* 261 U.S. 502; *Mitchell* v. *United States,* 267 U.S. 341; *United States* v. *General Motors Corp.,* 323 U.S. 373, 379; *Mullen Benevolent Corp.* v. *United States,* 290 U.S. 89, 94–95; *Bothwell* v. *United States,* 254 U.S. 231, 233.

Furthermore, as the Court of Claims pointed out (Pet. App. 3), compensation has been paid for the interests in the gravel deposits of the landowners and of Klein and Wagner as well. Contrary to petitioners' supposition (Pet. 14–15), the Court of Claims did not rely on *res judicata,* but merely demonstrated that the just compensation requirement of the Fifth Amendment had been fully satisfied.

It is also clear that Iowa law, relied on by petitioners (Pet. 24–25), has no application here. Federal law determines what constitutes property for purposes of federal eminent domain. *United States* v. *Miller,* 317 U.S. 369, 379; *State of Nebraska* v. *United States,* 164 F. 2d 866, 867–868 (C.A. 8), certiorari denied, 334 U.S. 815.

There being no possible recovery for the gravel contracts themselves in these circumstances, all of petioners' collateral contentions concerning procedural matters (Pet. 10–11, 25–26) and the use of the property after the United States took possession (Pet. 8) become irrelevant. Accordingly no question warranting review by this Court is presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1967.

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PETITION FOR REHEARING

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1967

No. 735

Jake Klein, Julian Garrett et ux.,
Petitioners

v.

The United States,
Respondent

Julian Garrett et ux., Neill Garett et
ux., and Earl Wagner,
Petitioners

v.

The United States,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Claims

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The United States,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Claims

---

PETITION FOR REHEARING

The petitioners ask for a rehearing of the Court's denial, on January 15, 1967, of their Petition for Writ of Certiorari to the United States Court of Claims.

QUESTIONS PRESENTED

(1) Whether the record supports the affirmative defense of the United States that payment of just compensation has already been made to the petitioners for the taking of their gravel interests; and

(2) whether the record supports the defense, also affirmative, that the gravel contracts were not taken but were merely frustrated, and whether such defense is available to the United States, the United States not having asserted such defense in the condemnation cases, and after having admitted-and never denied- in the condemnation cases, the taking of the gravel contracts and its liability to pay just compensation for such taking.

SHORT STATEMENT OF ARGUMENT

The two affirmative defenses, namely "frustration and "payment" are contradictory. They were upheld by the Court of Claims and they are presented on pages three and four of

the government's Brief in Opposition. They may be more fully described as follows:-

(1) The gravel contracts "were not taken by the United States at all but simply frustrated" and therefore "that the Fifth Amendment does not require compensation for consequential damages resulting, as here, from the frustration of contracts or business when land is condemned."

(2) The petitioners have already been paid in the District Court condemnation cases for their gravel interests and, "Contrary to petitioners' supposition, the Court of Claims did not rely on res judicata, but merely demonstrated that the just compensation requirement of the Fifth Amendment had been fully satisfied."

Thus the Court of Claims and the government in "(1)" state "that the Fifth Amendment does not require compensation" and in "(2)" state "that the just compensation requirement of the Fifth Amendment had been fully satisfied." They admit in "(2)" the "just compensation requirement of the Fifth Amendment" in the cases at bar, while denying such requirement in "(1)".

The defense of payment is based upon certain awards made by the United States District Court for the Southern District of Iowa at Des Moines in the condemnation cases of the lands which the gravel deposits underlay. Important

among the factors of value that were included in the awards was, as stated by the District Court "the reasonable profit which could be anticipated" from the performance of the gravel contracts (Government exhibit, District Court's Memorandum of October 19, 1966, Additional Appendix 11). Anticipated future business profits would certainly be personal property and not within the jurisdiction of the District Court in statutory actions for the condemnation of real estate. There was no question in the condemnation trials in Des Moines but that the government had taken the gravel contracts and was liable for the payment of just compensation therefor. The petitioners wich to call to the attention of the Court in some detail exactly what was done in the district court condemnation trials. The petitioners do not believe there was any payment of just compensation in the constitutional sense to anybody for the taking of the petitioners' gravel interests.

The petitioners will show that the defense of "frustration" cannot apply to the facts in the cases at bar and that all the authorities cited by the government on this subject support the petitioners' and not the government's position. Also, the petitioners submit that if such defense were available to the government, the government should have asserted such defense in the condemnation cases in Des Moines. Not having done so, the government has waived this defense and it should be thereafter estopped from asserting such defense, particularly after

having admitted its liability, in Des Moines, for the payment of just compensation for the gravel interests.

ARGUMENT

Conforming to the chronology of the facts the petitioners will argue "Payment" first and "Frustration" second.

PAYMENT

It would seem that the government's principal defense is that of payment. Obviously, if they have already been paid, the petitioners have no case. The government attached as exhibits to its Motions for Summary Judgment and to several of its briefs, the declarations of taking, the condemnation complaints and other documents from the records of the condemnation cases in the United States District Court in Des Moines. The government also gave the Court of Claims the District Court's Memorandum of October 19, 1966 (Additional Appendix 3-13) ex parte, which has discovered by the petitioners only when they saw references to the Memorandum in the opinion (Pet. App. 3) of April 14, 1967, of the Court of Claims sustaining the government's Motions for Summary Judgment. The Memorandum of December 13, 1966, (Add. App. 19-23) was given to the Court of Claims during a hearing on January 10, 1967. All of these documents were introduced into the record for the sole purpose of establishing the

government's claim of payment. But there is nowhere any evidence of any payment whatsoever, lawful or unlawful, to the petitioners, Garrett for the taking from them of their gravel leases."

The government's defense of payment was set up by the joinder of the instant Court of Claims cases to the land condemnation cases in the District Court in Des Moines, although at the time of the "joinder" the instant cases were already pending in the Court of Claims and that Court already had jurisdiction over them (Pet. 9). The "joinder" was accomplished by requests by the government to the condemnation commission for special findings and by instructions given by the District Court to the Commission, in both cases. The first instruction was a stock textbook instruction given by the Court in all its condemnation cases. The other two, however, were unprecedented among the Red Rock Reservoir cases. The instructions, relating to minerals or gravel, were as follows:

(Government Exhibit, District Court's Memorandum of October 19, 1966 Add. App. 7)

> "The court further instructs the commissioners that when a tract of land contains minerals, timber, buildings or any other features which constitute a part of the realty, the existence of these features can be taken into consideration, in determining the compen-

sation so far as they affect the market value of the land but the market value of the land as land remains the test and there can be no recovery for any of the foregoing elements valued separately as merchandise as items additional to the value of the land."

(Same Government Exhibit, Add. App. 4)

The government "* * * hereby requests the Commission to set forth in its Findings of Fact and Conclusions of Law whether or not there was any enhancement to Tract No. 866 by virtue of the fact that sand and gravel deposits are located under a portion of said tract. If the answer to the above is in the affirmative, the Commission should set forth the extent of the enhancement, if any."

(Same Government Exhibit, Add. App. 12, 21)

"In this case the ownership of the land is in the Garretts who entered into a gravel contract with Earl Wagner (Jake Klein). After you have determined just compensation for the fee simple estate taken by the Government, you are instructed to determine what amount, if any, of such just compensation shall be awarded Earl Wagner

(Jake Klein) by reason of such gravel contract."

The Garretts made various objections to the last instruction including the one as referred to by the District Court: "The defendants Jake Klein, Loyat Bland Garrett and Julian Garrett filed a twenty-one page pleading on November 23, 1966, entitled 'Motion to Strike and Plea to the Jurisdiction' " (Government Exhibit, Memorandum of District Court of December 13, 1966 Add. App. 19). The District Court, however, rejected all objections, stating that the pleading was not timely and that all the defendants had requested that the instruction be given (Add. App. 12, 21). The defendants, Garrett, in their appeals, deny they made any such requests and point out that there is nothing in the District Court records showing they made such requests. In any event, the petitioners submit that the District Court did not have jurisdiction over the gravel matters since these properties were not included in the government's declarations of taking and condemnation complaints and estimated just compensation was never deposited for them (Pet. 12-14). Jurisdiction over subject matter cannot be conferred by consent or stipulation of the parties. As this Court said in United States v. Corrick, 298 U.S. 435, 440:

"The appellants did not raise the question of jurisdiction at the hearing

below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore, have declined sua sponte, to proceed in the cause. (Citing cases) And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. While the District Court lacked jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit. The decree must, therefore, be reversed and the cause remanded with directions to dismiss the bill."

The joinders of the instant cases in the Court of Claims to the condemnation cases in the District Court in Des Moines were not permissible for the following reasons:

1. The instant cases were filed in the Court of Claims in February, 1966, whereas the "joinders" were not attempted until April and May, 1966-after the Court of Claims had already taken jurisdiction.

2. New or additional property, namely the gravel, gravel contracts and gravel businesses, could be taken by condemnation only by listing

them in a new declaration of taking and condemnation complaint, or, perhaps, by including them in amendments to the original declarations of taking and complaints and, in either case, by the deposits of estimated just compensation as to such new properties. This was not done and, the petitioners submit, the procedure followed-introducing the gravel contracts into the condemnation cases merely by means of instructions by the District Court, has no sanction or validity under the law and the District Court could not thereby give itself jurisdiction over the gravel matters.

3. The statutes conferring original jurisdiction on the District Court to try federal condemnation cases refer only to the condemnation of real estate.

4. The gravel contracts and gravel businesses and the anticipated profits from the gravel businesses were personal property (Pet. 13-14) and the former owners could sue for just compensation for the taking from them of such properties only under the Tucker Act. In holding an award for rent void the Fifth Circuit Court of Appeals stated in United States v. 534.7 Acres (Fla.) (1946) 157 F2d 828: "**claims under the Tucker Act may not be made in a condemnation proceeding."

The petitioners submit that there were no payments at all to them of just compensation in the constitutional sense for the taking from them

of their gravel contracts and gravel businesses. In order to reveal exactly what was done by way of "payment" and how, as the government put it "the just compensation requirement of the Fifth Amendment had been fully satisfied" (Government Brief in Opposition 4), the petitioners again refer to the Governments's Exhibit, the District Court's Memorandum of October 19, 1966 (Add. App. 5-6) where the District Court, adopting the Commission's Report stated:

"It (the Commission) found that just compensation for the entire fee simple title to tract #866 to be $121,800.00; that the value of the gravel lease was $5,000.00. The report further shows that the Commission in finding the total just compensation allocated the same as follows:

"350 acres of cropland at $275.00 per acre	$ 96,250.00
191 acres of timber, waste and building sites, including buildings	9,550.00
Additional increment allowed for the underlying sand and gravel under tract 866	16,000.00
Total	121,800.00"

Obviously the gravel lease was not included in the "total" compensation award. The $5000 to gravelman Wagner for the gravel lease was not included among the items listed, the "Total" value was for land only, as shown by the items that went into it, and under the District Court's Instruction No. 4 (Add. App. 7) no "merchandise" or non-land value could be considered by the Commission. And, the District Court also instructed (Add. App. 12, 21) the Commission that: "In this case the ownership of the land is in the Garretts." Therefore, all of the awards made for the land should have gone to the landowners, the petitioners Garrett. There was no instruction or finding that the gravelman, Wagner owned any of the land. The petitioners have already pointed out (Pet. 13-14) that in 1966 the Court of Claims, in other cases, held, referring to mineral leases, "that such leases do not constitute a sale of any part of the land." Yet the District Court (Add. App. 11) took $5000 from the award made for the land only, and gave this sum to Wagner-- and the Court of Claims held this was payment of just compensation to the petitioners, and the government says "that the just compensation requirement of the Fifth Amendment had been fully satisfied."

(Government Brief in Opposition 4)

The petitioners call particular attention to the including by the District Court among the

factors of value used in determining the value of the gravel contracts of "the reasonable profit which could be anticipated" (Add. App. 11). The government made no objection to the consideration of this factor of value nor did it appeal. It therefore not only admits again its liability to pay just compensation for its taking of the petitioners' gravel contracts--it also admits by acquiescence its liability to pay for lost anticipated business profits as reflected in the value of the contracts. In the purchase of any business this factor would usually be the most important considered by any prospective purchaser. But this factor goes to the value of a business, the gravel business, which is personal property, and it would be inadmissible in determining the value of the land. And the consideration of such anticipated profits would certainly contradict and violate the District Court's Instruction 4 (Add. App. 7) which strictly and properly limited the Commission to the consideration of land values only. Yet the District Court took $5000 from the award made strictly and legitimately for the land and used this sum to pay for the gravel lease, including such anticipated business profits! The $5000 not having been included in the total award made only for the land in the first place, there could be no justification in law, morality or logic for taking this amount from the legitimate award made only for the land, and using it to pay for expropriated personal property. And the government argues and the Court of Claims holds (Government Opposition

Brief 4) that the petitioners, including the Garretts, have already been paid for the taking of the gravel leases from them. Taking $5000 from the Garretts and calling this "compensation" to them? Nonsense! The ancient homily "Robbing Peter to pay Paul" certainly fits this situation.

It would almost seem that the District Court thought that the Garretts instead of the government "took" the gravel leases and anticipated profits. Suppose the District Court had decided the gravel lease was worth $100,000 instead of $5000. Taking $100,000 away from the "Total" of $121,800 would leave the landowners, the Garretts only $21,800 for their land. And what if the District Court thought the lease worth $200,000? The more valuable the lease the more the Garretts would lose. The absurdity of this part of the record is manifest.

The lower courts completely overlooked the crucial fact that before there could be any profits in carrying on the gravel business-- indeed, before any gravel business could be carried on at all-- royalty would first have to be paid by the gravelmen to the landowners for every cubic yard of gravel taken for their gravel businesses. Logic and justice demand that instead of "robbing" the landowners so as to pay the gravelmen for their lost "anticipated profits" the landowners should have been paid by the government for their lost royalties-- EX-

CEPT that the District Court did not have jurisdiction to award compensation for lost anticipated profits and lost royalties in statutory actions for the condemnation of real property, which actions never included the gravel contracts or gravel businesses or gravel royalties, all of which were personal properties and which were never included in the declarations of taking or in the condemnation complaints.

The situation of petitioner gravelman Jake Klein is identical in the other case except that the gravel enhancement of the value of the land was found to be $6000 and Klein was allowed $1000 from the land award for the taking of the gravel contract.

Nothing was paid or awarded to the petitioners, Garrett, the grantors in the gravel leases, for the taking from them of their part of the leases. And the taking of parts of the awards legitimately made only for the land, from the Garretts and the payment of such parts to Wagner and Klein, neither of whom owned any part of the land, was certainly a payment "to the wrong persons." As the Court of Appeals for the Fifth Circuit said in Clark v. White, 185 F2d 528 at page 530:

> "The Constitution requires that just compensation is made and the statutes charge the district court with seeing that this is done. It cannot be done by paying it to the wrong people."

In the constitutional sense, then, there was no just compensation paid to anybody for the taking of the gravel leases and gravel businesses. The only legitimate awards made were for the land. There was merely a robbing of Peter (the grantors, Garrett) to pay Paul (the grantees, Wagner and Klein). But the government made the payments without objection and without taking any appeals, and while the payments made were not just compensation in the constitutional sense, they were nontheless admissions of liability.

FRUSTRATION

A perplexing feature of the case is the startling metamorphosis that takes place en route between Des Moines and Washington in the government's attitude toward the gravel matters. In Des Moines, in the District Court, the government admits the taking of the gravel leases. Indeed, the District Court, in Des Moines, began its Memorandum of October 19, 1966 (Add. App. 3) as follows:

> "This matter is now before the Court upon objections to the report of the Commission determining just compensation for the taking of the title in fee of tract 866 consisting of 541 acres of land and for the taking of a gravel lease on said premises."

The District Court obviously held there was indeed a "taking" of the gravel lease, and it re-

ferred to the fee and the gravel lease separately. And, in the report of the condemnation commission, adopted by the District Court, was a reference to the "taking" of the lease (Add. App. 11):

> "e. Based upon the market, the quantity and quality of the sand and gravel and the reasonable profit which could be anticipated the Commission finds that the just compensation to Earl Wagner for the taking of the lease of January 8, 1962, is $5,000.00."

The government acquiesced in these statements. It admitted its liability for taking of the gravel leases when it acquiesced in and participated in the requests for special findings and the giving of instructions to the Commission relating to the gravel matters, as set out earlier in this Brief. And, as already pointed out, in the second paragraph of its argument (United States Brief in Opposition on 4) it states "that the just compensation requirement of the Fifth Amendment had been fully satisfied." We have here a specific admission that the Fifth Amendment requires just compensation for the taking of the gravel contracts in Des Moines, that is. But something mysterious happens en route to Washington. In Washington, before the Court of Claims and now before this, the Supreme Court, the contracts, as stated in the first paragraph of the argument (United States Brief in Opposition 3) "were not taken by the United

States at all but simply frustrated" and the Court of Claims so held. Obviously the contracts were not frustrated in Des Moines and therefore they could not be frustrated in Washington. Nothing new or different happened to them in Washington. There may, indeed, be frustrations in Washington, but they can have no application to the cases at bar.

The government was in complete control of the condemnation cases in Des Moines and it initiated or consented to all the procedures that were followed. The petitioners submit that the government should be estopped, after the position it took throughout the trials in Des Moines, consenting to and acquisecing in the nominal, although made without jurisdiction, awards to the gravel contract lessees, and paying the amount of such awards into Court- from now reversing its position and claiming that it never took the gravel contracts at all. The law (Pet. 4-7) gives the government and the government alone the power to determine what properties it will take by condemnation, and the government alone also determines what properties it will take without condemnation. But in either case it is still subject to the requirements of the Fifth Amendment.

The rights of the petitioners do not correspond in any way to the rights of the Omnia Company in Omnia Commercial Co. v. U.S., 261 U.S. 502 (1923) a wartime case, which is the

case relied on principally by the government. The Omnia Company was merely a steel customer of the Allegheny Steel Corporation and it had no contact with the government, nor did it have any claim to any specific steel. The Omnia Company would be in the position of a gravel customer who had contracted for a quantity of gravel from the plaintiff gravelmen. The Allegheny Steel Corporation was not allowed to furnish the steel to the Omnia Company. But the Allegheny Company certainly received just compensation. As aforesaid the government had nothing to do with the Omnia Company but it took harsh, direct and intended action against the petitioners, specifically to force them to give up the performance of the gravel contracts and the carrying on of their gravel businesses (Pet. 16-17, 19). And, after depriving the petitioners of their gravel businesses by threats and by legal action, the government then furnished gravel to gravel customers of the petitioners (Pet. 16, 19-20). If, after forcibly preventing Allegheny from perfroming its contract to fill Omnia's order for steel, the government had then taken Allegheny steel and supplied it to Omnia and had refused just compensation NOT TO OMNIA BUT TO ALLEGHENY--then the cases would be somewhat similar. The petitioners should be cast in the role of Allegheny- not of Omnia.

The Court of Claims overlooks the fact that the gravel businesses of the petitioners was taken as well as the gravel and gravel contracts

(Pet. 16, 19-20) and that thousands of tons of gravel were furnished by the Government to gravel customers of the petitioners. The government (Government Op. Br. 4) and the Court of Claims (Pet. App. 5-6) cite Mitchell v. U.S., 267 U.S. 341 (1925) where a claim was not allowed for the loss of a corn-canning business when the government took the land on which the corn was produced. The government had not taken the corn or the corn-canning business.

But the government DID take the petitioners gravel and gravel business.

The Court of Claims, in its opinion of April 14, 1967 (Pet. App. 5-6) states that it followed the Mitchell case in its own recent case of R. J. Widen Co. v. U.S., 174 Ct. Cl. 1020, 357 F. 2d 988 (1966). The Widen Company was in the leather business and the construction of the government's flood control project damaged the Company's leather inventory and caused business losses. No compensation was allowed because the government had not taken the leather or the leather business, the Court of Claims stating (Pet. App. 6):

> "* * * Undoubtedly, the United States could here have taken the plaintiff's personal property and business, in which case just compensation would be due. But this was not done."

The petitioners submit that THIS WAS DONE in the instant cases, and therefore, they are entitled to just compensation.

The Court of Claims, in its opinion (Pet. App. 3-4) cites A. W. Duckett & Co. v. United States, 266 U.S. 149 (1924) and thereby adds the instant cases to the illegitimate progeny of that much cited case. The illegitimate progeny result from the overlooking, by lawyers and courts, of the first word "Ordinarily" of the sentence for which the case is usually cited. The Duckett case and the cases at bar are not ordinary cases. Also overlooked is that Duckett is not a condemnation case. And, surprisingly, what the case holds is overlooked. This Court reversed the Court of Claims holding that Duckett's property (a lease) had not been taken. A separate award was ordered for Duckett even though there had already been a settlement with the owner, the Bush Terminal Co.

The condemnation cases in Des Moines were not ordinary cases either. Mr. Frank McAnear of the Department of Justice in Washington was in attendance in Des Moines and participated actively in the trials of both cases. This was a distinction accorded to none of the other Red Rock Reservoir cases as far as we know.

WITHDRAWAL OF ADMISSION

The petitioners withdraw their "agreement" (Pet. App. 2, 3) "that the fee simple titles taken by the defendant included the gravel deposits". The government's conduct from the time in 1962 of the filing of its declarations of taking and its condemnation complaints up to the time, December 30, 1966, when it paid into court the final awards made in the condemnation cases show conclusively that the gravel deposits were not included in the takings. There is no question but that the government did NOT deposit any estimated just compensation for any of the gravel items, including the gravel deposits. The government's representatives stated, in 1962, that the government was not depositing or paying anything for gravel because it hadn't taken any gravel-that there was no gravel there, although full information about the gravel had been given. Later, when events forced even the government to admit that massive deposits of commercial gravel were present, the government did not amend its declarations of taking and condemnation complaints or deposit any money as estimated just compensation for the gravel. And it continued to refuse to pay anything for any of the gravel items. And at the time the final condemnation judgments were paid into court, December 30, 1966, the gravel items were paid for out of the new funds just paid into court (Add. App. 18, 28) although there was still money remaining from the original deposits of estimated just compensation

made in 1962-- thus confirming the fact that the government did not deposit any estimated just compensation for the gravel items back in 1962. The petitioners are entitled to amend their petitions so as to plead these facts in full, and also to plead the government's various admissions as heretofore discussed.

The petitioners Julian Garrett and Loyat Bland Garrett had lived on the now condemned land since the spring of 1942 and it had been their home and sole means of livlihood for them and their five children. All this time they had had a comfortable feeling of security in the knowledge that their land contained gravel deposits amounting to millions of cubic yards. They knew that anytime they could bring themselves to enter into gravel contracts and permit the tearing up into gravel pits of their beautiful Iowa rich farmland, the royalties provided for by the contracts would amount to a fortune every few years, particularly since the rising business cycle seemed likely to continue indefinitely. The Red Rock Dam Project forced their hand. But even in 1962 it seemed likely that it would be 10 years or so before the land would be flooded, and there was still time to get out the gravel- so the gravel contracts were entered into. But the way matters have been manipulated they not only lose the sizeable royalty fortune the gravel contracts should have given them-- the gravel contracts even became

liabilities for which they were charged $5000 and $1000 as explained in detail earlier in this argument. They are very bitter.

CONCLUSION

Finally, the petitioners submit that the government has not proved its defenses of payment and frustration as matters of law so as to entitle it to summary judgments. On the contrary, the two defenses are conclusively disproved by the government's own exhibits.

For all of the foregoing arguments and reasons the petitioners ask that they be given a rehearing of the Court's denial of their Petition for a Writ of Certiorari.

Respectfully submitted.

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CERTIFICATE OF GOOD FAITH

The undersigned certifies that he is a member of the bar of this Court and that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay and that it is restricted to the grounds specified by the rules of the Court.

Bert A. Bandstra

CERTIFICATE OF SERVICE

The undersigned certifies that he is a member of the bar of this Court and that he served the above and foregoing Petition for Rehearing by mailing a true copy thereof by prepaid air mail to each of the following persons:

Erwin N. Griswold, Solicitor General
J. Edward Williams, Acting Asst. Attorney General
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Bert A. Bandstra